

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BRIAN PHEIL,

Plaintiff,

v.

SGT. BOWE, CO HAND, CO VARLEY,
CO RABUCK and KIMBERLY RICHARDSON,

Defendants.

ORDER

10-cv-555-bbc

In this civil case for damages, plaintiff Brian Pheil alleges that defendants Sgt. Bowe, CO Hand, CO Varley and CO Rabuck violated the Eighth Amendment by depriving him of various medications and that defendant Richardson had plaintiff transferred to another prison because he had complained about his medical care. Defendants have moved for summary judgment, arguing that plaintiff cannot prove that they deprived him of any necessary medical care or that defendant Richardson had plaintiff transferred in retaliation for his complaints about medical care. Plaintiff did not file a response to the motion, which means that all of the facts proposed by defendants are undisputed. I conclude that defendants have shown that they are entitled to summary judgment on plaintiff's claims

against them.

From the facts proposed by defendants and unopposed by plaintiff, I find that the following are undisputed and material.

UNDISPUTED FACTS

Plaintiff Brian Pheil was incarcerated at the Stanley Correctional Institution in July and August 2009. During those months, defendant Emily Bowe was employed at the institution as a sergeant; defendant Andrew Hand was employed as a correctional officer; Nicole Varley was employed as a correctional officer; David Rabuck was employed as a sergeant; and Kimberly Richardson was employed as an inmate complaint examiner.

On July 26, 2009, plaintiff was placed in temporary lockup, pending an investigation of his receipt and ingestion of contraband during a visit. Plaintiff was under observation so that when he defecated, his feces could be examined for evidence of the contraband. No contraband was found and he was released to his housing unit on July 28.

Before plaintiff was placed in temporary lockup, he was taking three controlled substances prescribed for him, along with five non-controlled medications. His medical records show that from July 26 through July 28, 2009, he received all of the controlled medications prescribed for him, in the correct dosages. He did not receive the non-controlled medications, which included three over-the-counter medications to maintain

health (omega 3 fish oil, naproxen and rantidine) and he did not receive two medications (pioglitazone and glyburide), which are low-dose medications used by diabetics to help lower blood sugar levels. Plaintiff was in segregation status again from August 18-19, 2009. Again, he received his controlled medications but did not receive his non-controlled medications.

Under Department of Corrections policy, non-controlled medications are issued to inmates for self-administration. These are generally medications with a low risk for inmate abuse because they are non-habit-forming. Health Services Policy/Procedure 800:20. Correctional officers administer controlled medications to inmates and make a record of their act on a medication administration record. They do not make any record of the administration of the non-controlled medications, because they are self-administered. The policy requires correctional officers to keep all medications under officer control and allow inmates to have only emergency medications in their possession.

Plaintiff suffers from a form of mild, non-insulin dependent diabetes. During the relevant time, he maintained his diabetes on his own and did not require a special diet. He was able to check and self-report his own blood sugar readings and the readings that he reported to the health services unit were normal.

Plaintiff has not adduced any evidence that he suffered any serious physical consequences from missing his non-controlled medications. Between July 26 and July 29,

2009, he saw medical personnel on three occasions and made no complaint about his missing medications. No medical personnel reported his suffering any medical distress during this time period or from August 18-19, 2009. He did not file any health service requests for his missing medications during the times he was in segregation in the summer of 2009.

Plaintiff did file an inmate complaint about his alleged missed medications on August 10, 2009. Defendant Richardson spoke to plaintiff during her investigation of the complaint and included his complaints about the missed August 18, 2009 medications in her investigation. She dismissed the complaint on the ground that plaintiff had not reported his missing medication either verbally to the nursing staff when they visited him or in writing to the health service unit.

About the same time in July 2009 that plaintiff was placed in temporary lockup, former security director Reed Richardson learned that plaintiff was in prison for killing the uncle of a correctional officer at the Stanley institution. Reed Richardson initiated a special needs placement on August 27, 2009 to avoid the perceived security risk of having plaintiff in the same institution where the nephew of his victim worked. A hearing was held by the Program Review Committee. Plaintiff waived his right to appear at the hearing and made no specific requests of the committee about his placement. The committee approved his transfer to the Jackson Correctional Institution. Complaint examiner Kimberly Richardson

had no involvement in the transfer decision. Institution complaint examiners play no role in reviewing or approving special needs decisions arising out of security concerns.

OPINION

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. In this case, plaintiff's failure to oppose defendants' motion means that there is no genuine issue of fact about plaintiff's two claims of constitutional violations.

1. Denial of medication in temporary lockup

Defendants do not deny that plaintiff was deprived of his non-controlled medication for up to three days in July 2009 and two days in August 2009; they do deny that the deprivation caused plaintiff a serious medical need to which they were indifferent. Plaintiff did not propose any facts to the contrary.

A "serious medical need" is one that is life-threatening or carries a risk of permanent serious impairment if it is left untreated or one that results in needless pain and suffering when treatment is withheld. Gutierrez v. Peters, 111 F.3d 1364, 1371-73 (7th Cir. 1997). Plaintiff did not allege facts in his complaint to support his claim that he suffered needless pain or ran a risk of permanent impairment because of the withholding of his non-controlled

medication and he never came forward to prove any such claims. It is true that diabetes is a serious disease, but it does not always amount to a “serious medical need” for Eighth Amendment purposes. Fortunately for plaintiff, his diabetes is mild and he does not need constant medication. Defendants are entitled to summary judgment on this claim.

2. Claim against defendant Richardson

The undisputed facts show that there is nothing to plaintiff’s allegation that defendant Kimberly Richardson engineered his transfer to another prison in retaliation for his filing complaints about his lack of medical care. They show, instead, that plaintiff was moved out of the Stanley Correctional Institution so that he would not be in the same prison in which his victim’s nephew worked as a guard. This was a reasonable way of protecting both plaintiff and the prison guard, but even if it were not, plaintiff has adduced no evidence that it was a decision made by defendant Kimberly Richardson in retaliation for plaintiff’s filing of medical complaints.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Sgt. Bowe, CO Hand, CO Varley, CO (now Sgt.) Rabuck and Kimberly Richardson is GRANTED. The clerk of court is directed to enter judgment for defendants and close this

case.

Entered this 21st day of May, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge